Plural Constitutionalism as Theory and Method: A Reply to Critics

Daniel Halberstam 2015-03-23T10:47:41

I enjoyed the exchange on my article providing a qualified constitutional defense of Opinion 2/13. I will not delve into a point-by-point rebuttal of the critics here. Instead, I shall make three quick points and end with a methodological challenge in the interest of moving forward.

Mind the quotation marks

The title of my longer article is intended as an allusion to, and implicit critique of, Opinion 2/13's unrelenting style – not an endorsement thereof. Hence the quotation marks surrounding the provocative phrase. The invocation of modesty, in turn, is an appeal to turn down the heat and focus more calmly on the substance (even though that may include some rather large claims). It will not help the EU, the ECHR, or the cause of human rights to adopt the quoted style of discourse without the quotation marks.

Human Rights $\neq$ Human Rights Regimes

Commentators are right to be concerned about human rights. But we must distinguish between human rights and human rights regimes. The ECHR is a particular human rights regime with a particular institutional structure that has its strengths and weaknesses. (The EU, as a constitutional regime of governance, has its strengths and weaknesses, too.) Just as constitutional law must be understood as mediated by the institutional reality and context in which it operates, so, too, the cause of human rights alone does not justify the extension of any given human rights regime. When the EU's commitment to human rights is furthered by joining a particular human rights regime, it should be done in a manner consistent with the EU's core constitutional architecture.

"Monism" versus "Dualism"

Several commentators invoke this idea to suggest there is no problem with Strasbourg deciding questions of responsibility or resolving inter-state disputes as a matter of Convention law. As an initial matter, I confess these issues strike me as rather small stuff no matter what side you're on (I only devote a handful of my 50 pages to this). Indeed, there was no hue and cry about the co-respondent and Article 33 issues when the AG came out with her opinion, which essentially said the same thing as the Court does now.

In any event, dualism may indeed be a shield against the intrusion of an international jurisdiction into ones own internal affairs. I agree with that. And yet, the existence of that shield does not mean there are no constitutional objections to subjecting any and all internal legal decisions to an external (dualist) check. By signing on to the ECHR, the EU is signing on to a limited treaty to ensure against human rights violations, not to ensure against an improper division of competences among the Member States and the EU, or to provide an additional external mechanism for inter-state disputes that ought to be resolved by EU procedures.

Germany would not expressly allow Strasbourg to pronounce, even only as a matter of international law, on the division of powers between the Bund and the *Länder.* Nor would Germany allow one *Land* to sue another before an international tribunal. The same is true for any other federal state. To be sure, the EU is not a state, and the Member States have separate international legal personality. And yet, the division of competences between the EU and its Member States, as well as suits among Member States on questions of EU law, are internal matters governed by EU constitutional law much as the internal division of competences among the Bund and the Länder, or suits among the *Länder*, are governed by German constitutional law. There may be some pluralist wiggle room at the margins in the EU, as I carefully explain in my larger piece, but a simple doctrinal invocation of dualism does not do justice to these concerns.

The Challenge: Plural Constitutionalism as Theory and as Interpretive Method

If there is a theme running through my disagreement with the current critics, it's about method. When arguing about the Union, one question I often get asked is why we should care about whether we think of the Union in constitutional or, say, administrative law terms. If the current discussion on this blog has proven nothing else, it has proven that this choice matters deeply.

As I have argued in connection with the *Kadi* case, we see a dramatic change in approach there from the CFI's international view of the Union to the ECJ's constitutional view. Constitutionalism as an approach to the Union certainly made a difference. Elsewhere, I systematically traced the Court's interpretive stance of constitutionalism through the caselaw more generally. The same basic point proves central to this discussion as well.

Constitutionalism, for instance, answers some of the questions about autonomy. The autonomy of EU law is the autonomy of a constitutional system that does not depend for its legality on another system of law. The constitutional autonomy of EU law means that the EU ultimately controls is own law and its own processes of adjudication. Pluralism may enter the picture (as I argue it does) in that the EU's constitution is open to certain claims of legal authority from the outside, but only as long as those claims also make sense from the EU's internal point of view.

Plural constitutionalism is complicated business, not least because it demands appreciating and reconstructing in unconventional ways the rudimentary demands

of constitutionalism. These demands become especially intricate in federal-type systems. And this is just what I sought to do in my piece. Among the most challenging aspects (less discussed in the blog responses) were, first, to uncover the explosive tension between internal mutual trust and external human rights obligations and, second, to show how this tension can be diffused not by an exemption but by closing the third leg of the triangle between the Member States, the EU, and the ECHR. Another challenge was to uncover the "*consolidating function*" of domestic high courts in constitutional systems, an aspect of their role that only the EU's special situation and the problem of accession truly bring into focus.

My analysis, then, requires systematic attention to the *institutional* aspects of the constitutional law of the European Union, something that a single-minded focus on human rights (for all its moral force) tends to obscure. Even where I disagree with the Court, as in the case of mutual trust, for instance, I do not disagree with the Court's fundamental constitutional approach to the problem. That is why I termed my piece a modest "defense" of the Court. To be sure, I disagree with the Court's more specific constitutional analysis and its proposed solution on several issues. But I take the Court's constitutional concerns seriously, as well we should.

Let us, then, debate the Court's opinion on those terms, i.e. on the terms of the (plural) constitutional law of the European Union for which accession must make sense. We may still disagree, but we will get far closer to where we ultimately need to be in moving accession forward.

Finally, in the grand debates about Europe, all this shows, once again, that constitutionalism is not just a rarified theory of the Union. And it's not just a collection of legal rules. Constitutionalism deeply grounds an approach to the Union, and a corresponding method of interpretation. That method, in turn, reflects an important legal, social, and institutional reality of the European Union as we have it today. Indeed, to my mind, Opinion 2/13 is just the latest indication of its existence. And if you think that's somewhat circular, or just the beginning of a self-fulfilling prophesy, then welcome to constitutional law!
